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ALEXANDER L. STEVAS,
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NO. 83-1352

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NEIL E. BISCHOFF, *et al.*,

Appellants

V.

CITY OF AUSTIN, TEXAS

Appellee

ON APPEAL FROM THE COURT OF APPEALS
FOR THE THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS

MOTION TO DISMISS

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NEIL E. BISCHOFF, *et al.*,

Appellants

V.

CITY OF AUSTIN, TEXAS

Appellee

MOTION TO DISMISS APPEAL–
INSUBSTANTIALITY

MAY IT PLEASE THE COURT:

Appellee City of Austin, Texas, hereby moves that the appeal taken herein be dismissed on the ground that said appeal does not present a substantial federal question.

Opinion Below

This is an appeal from a decision of the Court of Appeals for the Third Supreme Judicial District of Texas which rejected Appellants' objections to the form of a ballot proposition established by ordinance and submitted to the electorate of the City of Austin, Texas.

Object

The object of this Motion is to dismiss Appellants' appeal as not being within the appellate jurisdiction of the Supreme Court of the United States as prescribed by the provisions of 28 U.S.C. 1257(2). The appeal does not present a substantial federal question; and the federal question sought to be reviewed was neither properly nor timely raised below.

Appellants seek to unjustifiably prolong this litigation by alleging a Constitutional defect in a duly enacted ordinance of the City of Austin and thereby continue to block and prevent the issuance of revenue bonds totalling approximately $100,000,000, and would now request this Court to examine and overturn the Court of Appeals' judgment on the basis of a general and vague claim of Constitutional infirmity. Appellants' dilatory tactics have caused financial harm to the City that will continue so long as this litigation is pending.

Why This Appeal Should Be Dismissed

The appeal is not within the appellate jurisdiction of this Court because it is not taken in conformity with the provisions of 28 U.S.C. 1257(2), the statute relied upon by the Appellants as the jurisdictional basis of appeal.

Under the statute, there must be a federal question presented in order to properly invoke the appellate jurisdiction of this Court; however, the mere presence of a federal question is not, per se, sufficient to permit a review by the Court, unless that federal question is

substantial. In this case, although Appellants raise an issue labeled as constitutional, it is so absolutely devoid of merit as to be frivolous.

Appellee would also note that even where a federal question is presented, it must have been properly and timely raised in the lower court(s); in addition, the matter must have been raised with particularity and with fair precision.

Trial herein was without a jury upon a stipulated record. The single ground of controversy was limited to the validity of a City ordinance calling an election. In and by their First Amended Original Petition and Notice of Election Contest, Appellants gave the reasons and grounds for their objection to the ordinance.

Nowhere in their pleadings did Appellants plead a violation of their own constitutionally protected rights, nor of others. At no time during the trial herein did the Appellants seek to raise this issue. The trial did not involve the constitutionality of the Appellee's ordinance. The Court of Appeals specifically held that the federal question was insufficiently and untimely raised by the post judgment motion filed by the Appellants.

Failure by the Appellants to sufficiently and timely raise a substantial federal claim precludes review by this Court. There is no valid jurisdiction in this Honorable Court and this appeal should, therefore, be dismissed.

Conclusion

Appellants have sought to bring an invalid and unwarranted appeal; therefore, it should be dismissed for want of jurisdiction.

RESPECTFULLY
SUBMITTED,

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